



Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio

JOHN E. SHOOP

*Prosecuting Attorney for the State
of Ohio*

Lake County Court House
Painesville, Ohio 44077
(216) 352-6281

Attorney for Petitioner

MARVIN R. PLASCO

301 Parkhill Professional Building
35100 Euclid Avenue, No. 301
Willoughby, Ohio 44094
(216) 951-8111

Attorney for Respondent

TABLE OF CONTENTS

ARGUMENT	1
APPENDIX:	
Opinion, Judgment Entry and Order of the U. S. District Court in Glenn v. Dallman	A1

TABLE OF AUTHORITIES

Cases

<i>Glenn v. Dallman</i> , No. C-1-78-289 (D.C.; S.D. Ohio, January 19, 1979) (Opinion, Order, and Judgment dismissing petition for a writ of habeas corpus)	2, 3
<i>Havey v. Kropp</i> , 458 F.2d 1054 (6th Cir., 1972)	2, 3

Supreme Court of the United States

October Term, 1978

No. 78-756

STATE OF OHIO,
Petitioner,

vs.

HERSCHEL ROBERTS,
Respondent.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio

ARGUMENT

This supplemental brief has been prepared to bring to the attention of this court additional authority in support of the granting of a writ to review the decision of the Ohio Supreme Court in this case. The authority presented herein was not available when the petition for a writ of certiorari was filed on October 17, 1978.

On January 19, 1979, Chief Judge David S. Porter of the United States District Court for the Southern District

of Ohio filed an opinion, order, and judgment dismissing a petition for a writ of habeas corpus sought on precisely the same grounds that respondent herein has so far successfully asserted in his appeals.

The opinion, order, and judgment in *Glenn v. Dallman*, No. C-1-78-289 (D.C., S.D. Ohio, January 19, 1979) are set forth in full in the Appendix. The facts in *Glenn* are nearly identical to those herein. Witness Mevilin Rogers testified for the prosecution¹ at Glenn's preliminary hearing in a manner which inculpated Glenn. She was cross examined. She then moved somewhere—perhaps California—and could not be located. By the time the case came on for trial (it had been delayed for some time because of Glenn's failure to appear), Ms. Rogers could not be located. Her preliminary hearing testimony was then introduced at trial via a transcript.

In his petition for habeas corpus, Glenn, like Roberts in his appeals, alleged denial of Sixth Amendment right of confrontation by such use of the preliminary hearing testimony.

Judge Porter concluded, as did the Ohio Supreme Court in *Roberts*, that a showing that the witness' whereabouts were unknown was sufficient to show the witness' unavailability.

But Judge Porter, relying upon *Havey v. Kropp*, 458 F.2d 1054 (6th Cir., 1972), reluctantly concluded that he was in error in his previous determination that "the

1. This is the only factual difference between *Glenn* and *Roberts*. In *Roberts*, the witness who later proved to be unavailable was called by the defense at the preliminary hearing, and surprised the defense by inculpating Roberts. Despite such surprise, respondent did not attempt to have her declared a hostile witness and proceed to cross examine, although he had every opportunity to do so. See Petition, at 8, note 2.

limited nature of cross examination conducted at preliminary hearings generally including the lack of motive on the part of defense counsel to develop the testimony" denied Glenn the right of confrontation if such testimony was used at trial.² In so reversing himself, Judge Porter noted the Ohio Supreme Court's decision *contra* in *Roberts* and his own personal disagreement with *Havey*, but concluded nevertheless that the federal right of confrontation was not denied in circumstances nearly identical with the facts herein.

Thus, it cannot reasonably be disputed that the Ohio Supreme Court erred in finding a denial of federal rights in its decision herein. It cannot be reasonably disputed that the Ohio Supreme Court, by ignoring the holdings of this court as set forth in the Petition, has thus decided a federal question of substance in a way probably not in accordance with the applicable decisions of this court, and sound discretion should be exercised to grant certiorari herein.

Respectfully submitted,

JOHN E. SHOOP

*Prosecuting Attorney for the State
of Ohio*

Lake County Court House
Painesville, Ohio 44077

(216) 352-6281

Attorney for Petitioner

2. See Petition, at 13, note 7.

APPENDIX

**Opinion of the U. S. District Court in
Glenn v. Dallman**

No: C-1-78-289

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRESTON GLENN,
Petitioner,

vs.

WILLIAM DALLMAN, SUPT.,
Respondent.

OPINION

(Filed January 19, 1979)

PORTER, C.J.:

This is a habeas corpus case with a somewhat complex history. A recitation of the pertinent background facts will be found in our two prior Opinions (doc. 12, 16). The issue in this case is whether the admission of the preliminary hearing testimony of Mevilin Rogers in petitioner's state trial for aggravated burglary and grand theft violated petitioner's Sixth Amendment rights to confront and cross-examine. In our first opinion, we concluded that petitioner's claims were without merit and ordered the petition dismissed (doc. 12, 13). Respondent then moved to alter or amend that judgment with respect to the reasons given for dismissal of petitioner's first claim pursuant to Fed. R. Civ. Pro. 59(e) on the basis that it was

clearly erroneous as a matter of law (doc. 15). In a subsequent Opinion, we concluded that a hearing was necessary on the issue of the unavailability of the witness Mevilin Rogers (doc. 16, 17). This hearing was held on November 20, 1978. Pursuant to Fed. R. Civ. Pro. 52(a), the Court hereby makes the following findings of fact and conclusions of law.

The missing witness in this case, Mevilin Rogers, was a life-long resident of Columbus, Ohio, and apparently still has parents and a sister living there. At the time of the burglary, she had been living at the home of Melvin Clark (which was next door to the burgled residence) for about a month. Clark testified at the hearing that he had known her for approximately twelve years because she was a friend of his ex-wife. Mevilin Rogers had previously lived on the East side of Columbus (Clark thought it might be on Fairborn Street), and had worked at the Welfare Department but, a month prior to the robbery, she had sold her household goods and moved into his house. This move was apparently in preparation for her departure for Los Angeles, California.

Clark (who was also a witness in the state trial) testified that, although he knew of Ms. Rogers' parents and sister, he did not know where to contact them or where they lived. He admitted on cross-examination, however, that he knew that Mevilin's mother was named Marcella and that she worked at the John Scales Co. in Columbus. He also testified that Mevilin had never been married ("so far as he knew"), and she had "quite a few friends," although none apparently visited her at Clark's house. Finally, he testified that, two weeks following the preliminary hearing in *State v. Glenn*, Mevilin left for Los Angeles and left no forwarding address, either with him or with the Post Office. Clark did not know whether

she ever made it to California and, to the present day, he still does not know "where she was at" (Testimony of Melvin Clark).

The other witness presented by the State was Donald L. Searles, a Columbus policeman, who had been the investigating detective in *State v. Glenn*. Searles has been a policeman for 13 1/2 years, including six and one-half years as a detective. Searles testified that, following the burglary, he interviewed Melvin Clark and Mevilin Rogers at the Clark residence (either that same day or the next day). At that time he showed them a series of pictures from which both Clark and Rogers separately identified petitioner (see also trial Tr. 6-7, 23-28, 32-42; preliminary hearing Tr. 15-16; 20-22). Both Clark and Rogers then testified at the preliminary hearing and identified petitioner (preliminary hearing Tr. 11-12, 18-19). Searles also testified that, because petitioner's state trial had been assigned "two or three times" (due to petitioner's repeated failure to appear), he attempted to locate Mevilin Rogers several times. Searles testified that he checked with the Columbus Post Office and found that Ms. Rogers had left no forwarding address. He also talked to Clark about her whereabouts and Clark told him she had left for California. On cross-examination, Searles also stated that he checked with other neighbors and they did not know where she had gone. Although Searles testified at the hearing that he did not ask Clark about her relatives, his prior testimony at the State trial indicates that he did ask Clark about relatives and Clark told him "he knows of no other relatives" (trial Tr. 200). When asked about his reply to Judge Shoemaker that he had "not [done] much, really" to find Mevilin Rogers, Detective Searles stated that he meant that there wasn't much more he felt he could do to find her. Searles apologized for not being more specific in his answers but he is no longer on robbery detail and

he cleared out his desk prior to being subpoenaed in this case. Searles basically stated that he relied on what Melvin Clark told him since he was unable to locate anyone else who knew Mevilin Rogers (Testimony of Detective Donald Searles).

Based upon this evidence and the facts recited in our prior Opinions, we think petitioner's Sixth Amendment claim is without merit. Under the applicable law, there are two prerequisites to the introduction of the prior recorded testimony of the absent witness: 1) the witness' "unavailability" at trial which includes a "good faith effort" by the prosecutorial authorities to obtain the witness' presence; and 2) whether there are sufficient "indicia of reliability" to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement which includes the adequacy of the cross-examination opportunity afforded at either the prior hearing or the trial itself. *Glenn v. Dallman*, No. C-1-78-289 (S.D. Ohio 1978) slip. op. at 6. We think our prior conclusions concerning the application of this test to the facts of this case were in error.

First, we conclude that a "good faith" effort was made to find Mevilin Rogers. From the testimony, it appears that Detective Searles discussed Ms. Rogers' whereabouts with Melvin Clark, the neighbors in the vicinity and that he checked several times with the Post Office for a forwarding address. We also think it likely that Detective Searles asked Melvin Clark about relations and was either told that Clark knew of no other relations or was told that Clark "didn't know how to contact them."¹ The effect in either case, we think, was the same. Detective Searles followed up what leads he had to Ms. Rogers' whereabouts and learned, from the one individual in a position to know,

1. As Clark stated, he "couldn't have contacted Mevilin's sister if he wanted to."

that she had gone to an undetermined destination in California with no forwarding address. As Clark testified, he still does not know whether Ms. Rogers ever made it to California. Thus, "the prosecution did not definitely know that [the missing witness] was in California and they did not have a specific address for her." *Eastham v. Johnson*, 338 F. Supp. 1278 (E.D. Mich. 1972). The facts of this case are much closer to the facts of *Eastham* than we realized and we think the result ought to be the same. 338 F. Supp. at 1281.

With respect to the second prong of this test, it appears this Court was in error. In our prior Opinion, we noted the limited nature of defense counsel's cross-examination at the preliminary hearing and held that sufficient "indicia of reliability" could not be present where defense counsel had the opportunity but did not have a similar motive to develop the testimony. See *Glenn v. Dallman*, No. C-1-78-289 (S.D. Ohio Aug. 8, 1978); slip. op. at 7-9. The Sixth Circuit has rejected such a view. *Havey v. Kropp*, 458 F. 2d 1054 (6th Cir. 1972).

In *Havey*, the Sixth Circuit was presented with this issue under a Michigan statute which is, in all material respects, identical with the statute involved herein. Compare O.R.C. § 2945.49 with 458 F. 2d at 1056. The Sixth Circuit first noted the limited nature of the cross-examination conducted at preliminary hearings generally including the lack of motive on the part of defense counsel to develop the testimony:

Whether the formal right of cross-examination at a preliminary hearing is precisely the same as that to cross-examination at trial is open to doubt. In practice considerations of trial philosophy and tactics generally may militate against more than a perfunctory cross-examination, if that, and it further appears that cross-

examination at such hearings varies widely in different jurisdictions. It must also be borne in mind that the issues at a preliminary hearing and at trial are substantially different, since while at the latter the issue is the guilt or innocence of the accused, the former is concerned only with whether an offense has been committed and whether probable cause exists to hold the accused for trial.

[The District Judge conducted an evidentiary hearing on the single issue of] the general practice in the conducting of preliminary hearings in the jurisdictions of and near that in which appellant's trial was conducted. Included in the evidence received at hearing was, by stipulation, an affidavit of an expert in the professional and geographical areas. That affidavit stated that it is the usual practice of defense attorneys not to reveal their case and not to cross-examine further where such examination cannot result in dismissal of the charge because too much other evidence of probable cause exists. It is further apparent that as a trial tactic cross-examination at this early stage of the procedure might well be considered harmful to a defendant by alienating the witness, by polarizing his views and by preparing him to offer even more damaging testimony at trial. (458 F. 2d at 1056)

The Sixth Circuit, however, rejected the argument based on such reasoning, in the following language:

On the basis of such factors, were it not for existence of an applicable Michigan statute, it might be difficult to conclude that appellant had not been denied the right of confrontation. In the present circumstance, however, neither was the defendant nor are we now considering the issue in the absence of an applicable statutory provision. . . .

This statute was in effect at the time of the preliminary hearing and, therefore, when appellant by his counsel decided to conduct only what he considered to be a limited cross-examination, he did so at his own risk. The opportunity for unlimited cross-examination existed, and since he was chargeable with knowledge of the statute and his rights under it, he cannot now be heard to complain because by his own choice he did not fully cross-examine. (458 F. 2d at 1056-57) (Footnote omitted.)

Although we realize that the courts of the State of Ohio have taken a contrary view concerning their own statute (see *State v. Roberts*, 55 Ohio St. 2d 191 (1978), petition for cert. filed, 47 U.S.L.W. 3348, 3427 (1978)), the question before us is what the Constitution requires. A state court's interpretation of the relevant constitutional law is not binding upon us. *Davis v. Heyd*, 479 F. 2d 446, 449 (5th Cir. 1973). The Sixth Circuit, in *Havey*, has taken the position that the Constitution requires no more than what occurred in this case. While we may disagree with that decision, it is not the function of a lower court "to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time . . .; on the contrary, . . . the measure of [a district court's] duty is to define, as best it can, what would be the event of an appeal in the case before it." *Spector Motor Serv. v. Walsh*, 139 F. 2d 809, 823 (2d Cir. 1943) (L. Hand, J., dissenting). *Havey* plainly indicates the result on appeal on the issue herein. Until it is overtaken by subsequent events, we have no choice but to follow it.

Respondent requested at the hearing that we reconsider our decision in the *Wainwright v. Sykes* "waiver" issue. *Glenn v. Dallman*, No. C-1-78-289 (S.D. Ohio 1978) (doc. 16, at 3-4). We have reconsidered our earlier ruling and concluded that we were correct.

A8

Thus, we conclude that petitioner is not prevented by an "adequate independent state ground" from presenting his Sixth Amendment claim herein but that petitioner's claim is without merit. The petition, therefore, should be dismissed.

/s/ DAVID S. PORTER

*Chief Judge, United States
District Court*

A9

**Judgment Entry of the U. S. District Court in
Glenn v. Dallman**

No. C-1-78-289

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRESTON GLENN

vs.

WILLIAM DALLMAN, SUPT.

JUDGMENT

This action came on for (hearing) before the Court, Honorable David S. Porter, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that petitioner's Petition for Writ of Habeas Corpus should be and is hereby dismissed.

Dated at Cincinnati, Ohio, this 19th day of January, 1979.

JOHN D. LYTER

Clerk of Court

/s/ ANNE CATANZARO

Deputy Clerk

A10

**Order of the U. S. District Court in
Glenn v. Dallman**

No. C-1-78-289

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PRESTON GLENN,
Petitioner,

vs.

WILLIAM DALLMAN, SUPT.,
Respondent.

ORDER

(Filed January 19, 1979)

This is a habeas corpus case with a somewhat complex history. A recitation of the pertinent background facts will be found in our two prior Opinions (doc. 12, 16). A hearing was held on the issue of the "unavailability" of the witness Mevin Rogers for petitioner's state trial for aggravated burglary and grand theft by this Court on November 20, 1978. Based on the findings of fact and conclusions of law stated herein, we conclude that petitioner's sixth amendment claim for relief is without merit. Fed. R. Civ. Pro. 52(a). The petition, therefore, must be dismissed.

SO ORDERED.

/s/ DAVID S. PORTER

Chief Judge, United States
District Court